Supreme Court, U. S.
FILED
MAY 11 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1699

VIRGIL AYERS, W.C. MEADERS, JR.,
BOYCE BLACKMON and JOE ACKER,

Petitioners,

v.

SPARTAN GRAIN & MILL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PAUL T. MICHAEL
GEORGE B. HALEY
KILPATRICK, CODY, ROGERS,
McCLATCHEY & REGENSTEIN
3100 Equitable Building
100 Peachtree Street
Atlanta, Georgia 30303
(404) 572-6500
Counsel for Petitioners.

May 11, 1979

Washington, D.C. • THIEL PRESS • (202) 638-4521

Page

TABLE OF CONTENTS

OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 11

I. In holding that economic power sufficient to render a tying arrangement unlawful *per se* cannot be shown by proof that a substantial number of purchasers accepted demonstrably burdensome terms, but can only be shown by proof that the seller had a unique cost advantage over its competitors, the decision below is in conflict with the decisions of this Court and the decision of the Court of Appeals for the Ninth Circuit in *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207 (9th Cir. 1977) 19

II. In holding that a buyer's simple desire to enter a tying arrangement is a sufficient explanation for its existence, the decision below is in conflict with the decision of this Court in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981 (1968) 19

III. The Court below failed properly to analyze other factors considered in *Fortner II* which support a finding of liability in this case 21

IV. In failing to hold that reciprocity is a *per se* violation of the Sherman Act, the Court below is in conflict with virtually every other decision which has considered the subject 24

CONCLUSION 27

APPENDIX – Order and Opinion of Court of Appeals 1a

TABLE OF AUTHORITIES

Page

Cases:

Aamco Automatic Transmissions, Inc. v. Tayloe, 407 F. Supp. 430 (E.D. Pa. 1976) 13, 22

Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969) 13, 17

Allis-Chalmers Mfg. Co. v. White Consolidated Indus., Inc., 414 F.2d 506 (3rd Cir. 1969) 25

Black v. Magnolia Liquor Co., Inc., 355 U.S. 24 (1957) 12

California Packing Corp., 25 F.T.C. 379 (1937) 24

Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39 (5th Cir. 1976) 13

Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. 1971) 26

F.T.C. v. Consolidated Foods Corp., 380 U.S. 592 (1965) 25

Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969) 12, 13

International Business Machines Corp. v. United States, 298 U.S. 131 (1936) 23

Moore v. Jas. H. Matthews & Co., 550 F.2d 1207 (9th Cir. 1977) 11, 17

Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958) ..... *passim*

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) ..... *passim*

Ryals v. National Car Rental System, Inc., 404 F. Supp. 481 (D. Minn. 1975) 25

Standard Oil Co. of California and Standard Stations, Inc. v. United States, 337 U.S. 293 (1949) 12, 13

Stavrides v. Mellon National Bank & Trust Co., 353 F. Supp. 1072 (W.D. Pa. 1973) 25

Cases, continued: Page

Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953) 13

United States v. Airco, Inc., 386 F. Supp. 915 (S.D.N.Y. 1974) 25

United States v. General Dynamics Corp., 258 F. Supp. 36 (S.D.N.Y. 1966) 25

United States v. Loew's, Inc., 371 U.S. 38 (1962) .. 11, 12, 21

United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977) ..... *passim*

Waugh Equipment Co., 15 F.T.C. 232 (1931) 24

Statutes:

Sherman Antitrust Act of 1890, Section 1, 15 U.S.C. §1 ..... *passim*

Clayton Antitrust Act of 1914, Sections 3, 4, 15 U.S.C. §14, §15 ..... 3, 4

Miscellaneous:

Law Reprints, 10 Trade Reg. Series No. 1 (1976/1977 Term) 15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

VIRGIL AYERS, W.C. MEADERS, JR.,
BOYCE BLACKMON and JOE ACKER,

Petitioners,

v.

SPARTAN GRAIN & MILL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, Virgil Ayers, W.C. Meaders, Jr., Boyce Blackmon and Joe Acker, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 3, 1978.

OPINION BELOW

The opinon of the Court of Appeals which is reported at 581 F.2d 419 (5th Cir. 1978) is reprinted at page la,

infra; no written opinion was rendered by the District Court for the Middle District of Georgia.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on October 3, 1978. A timely petition for re-hearing was denied on January 10, 1979. On March 29, 1979, Justice William H. Rhenquist granted the application of counsel for petitioners for an extension of time in which to petition this court for a writ of certiorari to and including May 11, 1979. The petition for certiorari was filed within the time allowed by that order. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1); Section 1 of the Sherman Act, 15 U.S.C. §1; and Sections 3 and 4 of the Clayton Act, 15 U.S.C. §14, §15.

QUESTIONS PRESENTED

(1) Whether under the decision of this Court in *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977) (*Fortner II*), economic power which will render a contractual tie illegal may be shown by proof that a substantial number of purchasers accepted a demonstrably burdensome package, or whether market power can only be shown by proving that the seller has a unique cost advantage over its competitors.

(2) Whether a buyer's desire to enter into a tying arrangement alone is sufficient as an explanation for its existence.

(3) Whether the ability of a seller to raise prices in lieu of imposing a tie-in and to engage in price discrimination between purchasers is evidence of market power and of the unlawful exercise thereof.

(4) Whether enforced reciprocal dealing is a *per se* offense under Section 1 of the Sherman Act.

STATUTES INVOLVED

Section 1 of the Sherman Antitrust Act of 1890, 15 U.S.C. §1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

Section 3 of the Clayton Antitrust Act of 1914, 15 U.S.C. §14:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Section 4 of the Clayton Antitrust Act of 1914, 15 U.S.C. §15:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any distirct court of the United States in the district in which the defendant resides or is found or has an agent,

without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Respondent Spartan Grain and Mill Company (Spartan) brought a civil action in the Middle District of Georgia seeking to collect amounts allegedly owed by Petitioners Virgil Ayers, W.C. Meaders, Jr., and Boyce Blackmon for the purchase of chicken feed. In their responsive pleadings, these Petitioners denied the alleged indebtedness and asserted several defenses and counterclaims, including a counterclaim based on the illegality, under Section 1 of the Sherman Act and Section 3 of the Clayton Act, of Respondent's contracts. The antitrust claims were severed by the trial court and were consolidated with an antitrust suit filed by Petitioner Joe Acker against Respondent.

Respondent's contract claims were tried separately and are not the subject of this petition. The antitrust claims were subsequently tried to a jury.

The relevant facts established by Petitioners' evidence are largely undisputed and include the following:

The Petitioners were individual owners of poultry housing and resided in Franklin, Hart and Elbert Counties, which are located in the northeastern sector of Georgia. When first contacted by Spartan, the Petitioners had been engaged in various phases of the poulty industry, principally in the production of hatching eggs, for periods of up to twenty years. The Petitioners had borrowed as much as $25,000 to build their poultry houses and three of the Petitioners derived their entire income from those houses.

Beginning, however, in 1967 and 1968, the poultry industry in the Petitioners' area entered into a prolonged slump. Numerous concerns which had previously placed hatching egg flocks with individual producers in Franklin, Hart and Elbert Counties, terminated such operations. Other concerns pulled out of the area, concentrating their flock placements closer to their bases of operation in Athens and Gainesville.

Because an individual producer could not assume the risk of buying a flock without a prearranged market for eggs, there were a number of empty poultry houses in the area, many of which remained empty throughout the period from 1968 through 1972. Three of the Petitioners, who had been with a concern which ceased operations in 1967, were themselves faced with that prospect. Prior to being approached by Spartan, these Petitioners had contacted everyone whom they thought might have information as to potential placements, but were uniformly told that no one "needed any growers at that time." The fourth Petitioner, who had been with Spartan since 1965, but who wanted by 1967 to obtain another arrangement, was similarly informed that "there weren't any birds available."

The simple fact, therefore, that Spartan had flocks for placement with the Petitioners in 1968 and 1969 was highly attractive. Indeed, because Franklin, Hart and Elbert Counties were so distant from the major processing centers in Gainesville and Athens, it was a question of dealing with Spartan or not dealing at all.[1]

---

[1] In the winter of 1968, Marbut Milling Company did discuss with several producers in the Petitioners' area the possibility of placing flocks on an "independent" basis, but was unable to do so because it could obtain a commitment for only two flocks from a

[footnote continued]

Spartan's program was even more desirable because it offered to place flocks on an "independent" as opposed to a "contract" basis. Under a "contract," the producer was essentially an employee compensated on a piecework basis; the company owned the flock and paid for the feed, and the producer was allotted 10 cents to 12 cents per dozen for the use of his houses and his labor. Under an "independent" arrangement, the producer was his own businessman; he owned the flock, paid for the feed and sold his eggs for substantially more. From the producer's standpoint, another principal difference between the two arrangements was one of profit potential -- under a "contract," the producer would make approximately $1.00 per bird; under an "independent" arrangement, the producer could make $2.00 per bird.

Spartan, therefore, often had "waiting lists" of producers for its program. As Spartan's sales manager testified, "[from 1968 to 1970] we generally had more breeder flock houses and independent customers prepared to put in breeder flocks available to us than we had markets for hatching eggs"; from 1970 to 1972, "the trend was even more in that direction."

There was, however, one drawback to the Spartan arrangement – it was a "package deal." Spartan would first obtain a commitment from a hatchery to purchase eggs for the life of a given flock[2] and Spartan would then order the flock covered by the commitment, but Spartan

---

hatchery and then only after it "indicated the breeders would be placed in South Georgia and that producers with Spartan were not to be contacted."

[2]The hatcheries were principally located in Pennsylvania and Ohio and, for numerous reasons, were not accessible to an individual producer.

would make this "package" available to the Petitioners *only* on the condition that they "feed Spartan Feed." Because the cost of feed is the largest item of expense in the production of hatching eggs, each of the Petitioners initially questioned this requirement and was assured that the price of Spartan feed would be "competitive"; when such assurances proved to be unfounded, each Petitioner complained about Spartan's prices and requested permission to purchase feed from other sources. Spartan insisted, however, on compliance with the condition and made no alternatives available to the Petitioners.

Not only were Spartan's prices initially noncompetitive, but the gap consistently widened. For example, Spartan's cash price at the end of 1969 for feed delivered to the Petitioners was $80.75 per ton as compared with a competitive price of $66.00, a difference of approximately $15.00 per ton. At the end of 1970, Spartan's price was $93.94 as compared with a competitive price of $74.90, a difference of approximately $20.00 per ton. At the end of 1971, Spartan's price was $91.34, as compared to a competitve price of $65.90, a difference of approximately $25.00 per ton. Accordingly, even after affording Spartan a credit of approximately $6.70 per ton for its services in providing the flock placement,[3] the Petitioners were overcharged from the outset and Spartan's feed prices became increasingly more onerous.

In addition, in winter of 1971 and continuing thereafter, Spartan reduced the energy level of its feed to a

---

[3]The credit was based on Spartan's dealings with producers in the Gainesville area where Spartan had a modicum of competition and on internal memoranda wherein Spartan identified a reasonable return for its services.

point 10% to 12.5% below the level of competitive feeds. Unlike, therefore, all of their previous agreements with Spartan, unlike the recommendations supplied through Spartan, unlike their experiences with other feed companies both before and after they dealt with Spartan and unlike the experience of a Gainseville producer who was using a competitive feed at the same time and feeding it to the same type of birds, Petitioners Blackmon and Meaders[4] were required under their last agreements with Spartan to feed 40 lbs., rather than 34 lbs., per hundred birds per day in order to maintain egg production.

Faced otherwise, however, with the prospect of empty houses, each of the Petitioners entered into a series of agreements with Spartan. Meaders signed four agreements covering a period from October, 1968 to July, 1972. Ayers signed four agreements covering a period from May, 1969 to August, 1971. Blackmon signed five agreements covering a period from November, 1968 to May, 1972. During the relevant period, Acker signed three agreements covering a period from May, 1969 to November 1971. Throughout their dealings with Spartan, the Petitioners were generally familiar with market conditions and periodically checked as to alternative arrangements, but were informed that nothing was available.

Illustrative of the necessity for the Petitioners to continue their relationship with Spartan was their experience when Spartan, due to a shortage of commitments from hatcheries, phased out its breeder flock program in 1971 and 1972. Meaders, for example, began actively seeking another arrangement in January, 1972, but did not obtain a flock until January, 1973 and was without

---

[4]Petitioners Acker and Ayers ceased dealing with Spartan just prior to Spartan's reduction of its feed energy levels.

income from his poultry houses for nine months. Moreover, Meaders was only able to obtain a "contract" for a mere 4,000 birds and would not have received even that flock had he not then been working as a serviceman for a hatchery.

Blackmon similarly was without income from his houses for eight months and Blackmon obtained a flock under a "contract" only after Meaders, as a hatchery serviceman, was in a position to assist him. Acker was without income from his houses for a year; Ayers' houses were empty for six to eight months before he obtained one flock of pullets and "that was it."

Even more indicative of Spartan's advantageous position *vis-a-vis* the Petitioners was the relative ease, under the circumstances, with which Spartan obtained producers. For example, despite the fact that its breeder feed cost $15.00 to $25.00 per ton more than comparable feeds, with the result that Spartan could not sell its feed to anyone in Georgia not tied to its program, Spartan was able to extract more than 600 agreements from producers contractually obligating them to "feed Spartan Feed." In the period from 1968 through 1971 alone, Spartan extracted more than 235 such agreements, covering more than 2,000,000 birds, and pursuant to which Spartan sold more than $5,500,000 in feed. As Spartan's serviceman for northeastern Georgia testified, "we had people that was wanting chickens at all times" and, when Spartan had birds available, it "didn't have a problem" finding houses. As Acker testified, "I didn't have any other choice but to go to Spartan except quit and lose what money I had invested in [my houses]."

At the close of Petitioners' evidence the trial court, applying a *per se* standard, directed a verdict for

Petitioners as to liability under §1 of the Sherman Act after ascertaining that Respondent would proffer no evidence, other than under the Rule of Reason, to controvert Petitioners' *prima facie* case. The issue of damages was then tried to a jury and verdicts were returned in favor of Petitioners for actual damages in the total amount of $50,003.01. Respondent's Motion JNOV was denied and judgment was entered on May 4, 1976, whereupon Spartan took its appeal.[5]

The Fifth Circuit Court of Appeals reversed the trial court's finding of liability under §1 of the Sherman Act, holding that under this Court's decision in *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 97 S.Ct. 861 (1977) (*Fortner II*), the trial court had applied an erroneous standard in finding that Spartan had sufficient economic power in the relevant market to render the tie unlawful. The Court of Appeals held that *Fortner II* requires a showing that the seller enjoys a unique economic advantage over its competitors in order to prove the existence of such market power.

Finally, the Court of Appeals declined to hold enforced reciprocity to be *per se* illegal under the Sherman Act.

Rehearing of that decision was denied.

---

[5]Petitioners filed a cross-appeal as to other issues not involved in this Petition.

REASONS FOR GRANTING THE WRIT

I.

IN HOLDING THAT ECONOMIC POWER SUFFICIENT TO RENDER A TYING ARRANGEMENT UNLAWFUL PER SE CANNOT BE SHOWN BY PROOF THAT A SUBSTANTIAL NUMBER OF PURCHASERS ACCEPTED DEMONSTRABLY BURDENSOME TERMS, BUT CAN ONLY BE SHOWN BY PROOF THAT THE SELLER HAD A UNIQUE COST ADVANTAGE OVER ITS COMPETITORS, THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IN MOORE V. JAS. H. MATTHEWS & CO., 550 F.2d 1207 (9th CIR. 1977).

As held in *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 6, 78 S.Ct. 514, 518 (1958), a tying arrangement constitutes a *per se* violation of Section 1 of the Sherman Act:

> . . . whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected.

That a "not insubstantial" volume of commerce was affected in this case was undisputed.

With respect to economic power, this Court in *United States v. Loew's, Inc.*, 371 U.S. 38, 45, 83 S.Ct. 97, 102 (1962) was careful to point out that:

> Market dominance . . . is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.

In *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 503-04, 89 S.Ct. 1252, 1258-59 (1969) (*Fortner I*), this Court went even further to state that:

> . . . [an] appreciable restraint results whenever the seller can exert some power over some of the buyers in the market, even if his power is not complete over them and over all other buyers in the market . . . . Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market.

The dilution of the economic power concept has stemmed principally from two considerations. First, as noted in *Northern Pacific, supra,* 356 U.S., 6, 78, S.Ct., 518:

> . . . "tying agreements serve hardly any purpose beyond the suppression of competition." [Citation and footnote omitted.] They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time, buyers are forced to forego their free choice between competing products.

Accord, Fortner I, supra, 394 U.S., 503, 89 U.S., 1258; *Standard Oil Co. of California and Standard Stations, Inc. v. United States*, 337 U.S. 293, 305-06, 69 S.Ct. 1051, 1058 (1949); *Loew's, supra,* 371 U.S., 44-45, 83 S.Ct., 102; *Black v. Magnolia Liquor Co., Inc.*, 355 U.S. 24, 25, 78 S.Ct. 106, 108 (1957).

Second, since it is not in a buyer's self interest to "obligate" himself to purchase from a single source "regardless of whether more favorable prices can be

obtained from other sources of supply . . . ," *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140-141, 88 S.Ct. 1981, 1985-86 (1968), it may be inferred that "only [the seller's] control of the supply of the tying device . . . could induce a buyer to enter [a tying agreement]." *Standard Oil and Standard Stations, Inc., supra*, 337 U.S., 306, 69 S.Ct., 1058. As a consequence, "tying agreements fare harshly under the laws forbidding restraints of trade." *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 606, 73 S.Ct. 872, 879 (1953).

Specifically, this Court and a number of lower courts have held that economic power may be established by proof that a defendant has been able to impose a burdensome tie-in on a not insignificant number of purchasers. *Northern Pacific, supra; Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976); *Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F.2d 55 (4th Cir. 1969); *Aamco Automatic Transmissions, Inc. v. Tayloe*, 407 F. Supp. 430 (E.D.Pa. 1976). As stated in *Northern Pacific, supra:*

> The very existence of [a] host of tying arrangements is itself compelling evidence of the defendant's great power, at least where, as here, no other explanation has been offered for the existence of these restraints. [356 U.S., 7-8, 78 S.Ct., 519.]

Justice Harlan, of course, dissented in *Northern Pacific*, but his dissent serves to confirm the basic principle. For example, Justice Harlan was not persuaded that Northern Pacific's land holdings had been shown to be "unique" and, similarly, Justice Harlan was not impressed with the mere number of tie-ins which Northern Pacific had extracted. Virtually all the restrictions contained an escape clause to the effect that another carrier could be used where it offered "lower rates or superior services,"

356 U.S., 17, 78 S.Ct. 524, and under such circumstances, Justice Harlan stated that:

> . . . it would appear that the inclusion of the tying clauses in contracts or leases might have been largely a matter of indifference to at least many of the purchasers or lessees of appellants' land, hence more is needed than the tying clauses themselves to warrant the inference that acceptance of the tying clauses resulted from coercion exercised by appellants through their position in the land market. [*Id.*]

If, however, the escape clauses had not existed, Justice Harlan's views would have been different as is evidenced by his statement that:

> . . . economic coercion by a vendor may be inferred, without any direct showing of market dominance, from the mere existence of the tying arrangements themselves, as where the vendee is apt to suffer *economic detriment* from the tying clause because precluded from purchasing a tied product at better terms or of a better quality elsewhere. [356 U.S., 16-17, 78 S.Ct., 524 (emphasis supplied).]

Accordingly, the Supreme Court was unanimous in *Northern Pacific* for the proposition that a plaintiff, apart from any showing of uniqueness, may offer as evidence of economic power the fact that a defendant has extracted a not insignificant number of economically detrimental restrictions.

Nor does this Court's decision in *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 97 S.Ct. 861 (1977) (*Fortner II*) represent a departure from the unanimous holding in *Northern Pacific*. In *Fortner II*, the plaintiff simply contended that he had been required to pay U.S. Steel more for prefabricated houses than he

would have allegedly paid its competitors in order to obtain very favorable credit terms from U.S. Steel which included financing not only of the houses, but of the lots on which they were to be placed.[6] The flaw in plaintiff's reasoning was that he made no effort, as admonished to do so by this Court in *Perma Life*, 392 U.S., 140, 88 S.Ct. 1985, to assess the "beneficial by-products of [U.S. Steel's] restraint . . . ." Stated differently, he afforded no offset for the value of U.S. Steel's favorable credit terms and, as a consequence, the jury's award of $93,200 equalled almost exactly the number of houses purchased times the alleged overcharge.

The reason for plaintiff's failure to follow the admonition of *Perma Life* was obvious -- the value of the credit *exceeded* the alleged overcharge. Plaintifff's own evidence, for example, was to the effect that other prefabricated home manufacturers charged a 10% discount fee,[7] as compared to U.S. Steel's fee of 1/2%, a difference on plaintiff's $2,000,000 loan of $190,000, or more than $900 per home.

In *Fortner II*, therefore, this Court held that U.S. Steel's entry into 42 agreements with others for the purchase of its homes at $443 above the price allegedly charged by competitors, was not evidence of economic power, Justice Stevens observing that:

> Proof that Fortner paid a higher price for the tied product is consistent with the possibility that the

---

[6]Plaintiff, for example, purchased 210 homes for $689,000 and received a loan of $2,000,000 at 6% interest, with only a ½% discount fee.

[7]Law Reprints, Trade Regulation Series, vol. 10, no. 1, 1976/77 Term, p. 139.

> financing was unusally inexpensive and that *the price for the entire package was equal to, or below, a competitive price*. And this possibility is equally strong even though a number of Home Division customers made a package purchase of homes and financing. [429 U.S., 618, 97 S.Ct., 866-67 (emphasis supplied).]

Stated differently, the "other explanation" for the 42 agreements in *Fortner II* was that U.S. Steel's *net price* for homes was no more, and in fact was less, than the net prices of its competitors so that it was to the plaintiff's *economic advantage* (or at least not to his economic detriment) to deal with U.S. Steel.

Here, by contrast, the petitioners heeded the admonition of *Perma Life* and did not rest after merely showing the magnitude of an arguably superficial overcharge. Only as a *first step* did the petitioners show that in receiving 69 cents per dozen for eggs and being required to "feed SPARTAN Feed," they paid Spartan approximately $114,000 more for feed than they would have paid to a competitor. The petitioners *then established* that in the adjacent Gainesville market where there was at least a modicum of competition, Spartan and others were paying 65 cents per dozen for eggs without a feed tie-in. From this and other evidence, including Spartan's internal memoranda, the value of the breeder flock program *alone* was *thus determined* to be approximately 4 cents per dozen -- the difference paid for eggs depending on whether or not a tie-in was extracted. Even, however, after the petitioners *deducted* this "beneficial by-product" (which amounted to more than $46,000) and after the jury afforded additional offsets for other Spartan services,[8]

[8]If, of course, the jury had not had a full range of evidence, both from the petitioners and Spartan, as to the value of each component of Spartan's program, its verdict would have been no more meaningful than was the jury's verdict in *Fortner II*. With, however, all the evidence before it, the jury was uniquely situated to determine that "the price for the entire package" was not even remotely "equal to," much less below, "a competitive price."

[footnote continued]

the *net competitive disadvantage* of being required to "feed SPARTAN Feed" exceeded $50,000.

Whereas, therefore, U.S. Steel could argue that its 42 agreements were not evidence of its economic power because those agreements were not shown to be economically detrimental to buyers, the petitioners here clearly established that Spartan's 600 agreements were economically detrimental to those required to purchase Spartan's feed. The petitioners are thus entitled to benefit from the holding in *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1216 (9th Cir. 1977) where the Court stated that even in the wake of *Fortner II*, "[o]ther possible indices of sufficient economic power include . . . a noncompetitive higher price" imposed on "substantial numbers of buyers . . . ."

Similarly, the petitioners are entitled to benefit from the holding in *Advance Business Systems & Supply Co., v. SCM Corp.*, 415 F.2d 55, 69 (4th Cir. 1969) (emphasis supplied) where the Court even more directly stated that "[a]cquiescence in the *burdensome term* by an appreciable number of customers gives rise to an inference that [the defendant had] 'some power over some buyers' in the market." Indeed, *Advance Business Systems* was cited with approval in *Fortner II*, this Court only noting that such an "approach depends on the absence of other explanations for the willingness of buyers to purchase the package," 429 U.S., 618 fn. 10, 97 S.Ct., 867, and referring to the page in *Advance Business Systems* where the Fourth Circuit stated that:

> The District Court's findings that SCM imposed the service contract tying arrangement in order to coerce customers to use only SCM supplies effectively rule out the possibility of any "legitimate business purpose" for the tie-in [such as the preservation of good will or the protection of a new industry]. [415 F.2d, 68.]

Here, therefore, the District Court was correct in observing that "commonsense [made] it evident that [Spartan's] package . . . was obviously prized" as "Spartan knew it would be"; that in the absence of another explanation, the "host of tying agreements [extracted by Spartan was] compelling evidence of the defendant's great power"; that there was no explanation for Spartan's arrangement "other than [its] desire to sell more feed" and "to fence out competitors"; and that:

> Spartan's ability to make arrangements with [breeders] for a source of birds and with hatcheries to buy eggs in the volume that is shown in three states among the number of people dealing with the millions of birds that we're talking about represents leverage and that represents economic power . . . . And that, gentlemen, is what . . . permitted Spartan to do what they wanted to do with the price of their feed and . . . to force out competition, and that's the very evil that the antitrust laws are intended to prohibit.

Since other feeds were at least equal, if not superior to Spartan's product, a "quality control" defense was not even offered and since Spartan's prices exceeded those of its competitors by as much as 40%, its program cannot be explained as merely a "form of price competition . . . ." *Fortner II*, 429 U.S., 618 fn. 10, 97 S.Ct., 867. Indeed, if tie-ins are still unlawful where the buyer simply receives "no benefit" in that the net price paid is not "cheaper

than if the restrictive clauses had been omitted," *id.* (quoting *Northern Pacific*, 356 U.S., 7-8, 78 S.Ct., 519), then they must be unlawful where the buyer suffers an economic detriment in that the net price clearly exceeds the value of the individual components.

Accordingly, *Fortner II* simply cannot be read to require a showing both that the defendant imposed economically burdensome terms on a not insignificant number of buyers *and* that the defendant's arrangement was unique. If that had been the case, this Court would not have needed to discuss plaintiff's failure to show that the entire package was economically disadvantageous. Rather, it is submitted that this Court simply held that given plaintiff's failure in *Fortner II,* he was relegated solely to the uniqueness standard.

II.

IN HOLDING THAT A BUYER'S SIMPLE DESIRE TO ENTER A TYING ARRANGEMENT IS A SUFFICIENT EXPLANATION FOR ITS EXISTENCE, THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT IN PERMA LIFE MUFFLERS, INC. V. INTERNATIONAL PARTS CORP., 392 U.S. 134, 88 S.CT. 1981 (1968).

The Court below first noted that the "producers could join Spartan or stop producing broiler eggs," 581 F.2d, 422, and then held that:

> The [trial] court relied on two of the factors urged by Fortner, the existence of tying arrangements and the uniqueness of the package. In *Fortner II* the Supreme Court rejected the first argument because there were other explanations for the willingness of the buyers "to purchase *the package*". The trial court here pointed out that there were no other explanations for the willingness of the producers to

> agree to buy all their feed from Spartan, but the evidence makes clear their reason they "purchase[d] the package" - their alternative was to stop raising breeding flocks . . . . [581 F.2d, 427.]

It is true, of course, that because of their investment in their chicken houses and for other obvious reasons, the petitioners wanted to continue producing hatching eggs, but the petitioners were no more desirous of remaining in a particular business than were the plaintiffs in *Perma Life Mufflers, supra*, where this Court noted that:

> . . . each of the petitioners had enthusiastically sought to acquire a Midas franchise with full knowlege of [the restrictive] provisions and had "solemnly subscribed" to the agreement containing the restrictive terms. Petitioners had all made enormous profits as Midas dealers, had eagerly sought to acquire additional franchises, and had voluntarily entered into additional franchise agreements, all while fully aware of the restrictions they now challenge. [392 U.S., 138, 88 S.Ct., 1984.]

As long, therefore, as the petitioners were not *in pari delicto*, a proposition for which there was no evidence and which, indeed, Spartan abandoned at the trial, their desire to continue earning their livelihoods in the same manner they had done so for as long as twenty years is not among the "other explanations" referred to in *Fortner II*.

To reiterate, Fortner failed to show that a competitive price for each component of the package which he purchased would have been any less than the net price which he paid for credit and homes to U.S. Steel. Similarly, here, if the producer's desire had been based on the economic advantages of Spartan's package considered as a whole, no showing of economic power would have been

made. Where, however, the producers established a *net economic detriment* of more than $50,000, the "desirability" of Spartan's arrangement is added evidence of Spartan's economic power. *United States v. Loew's, Inc.*, 371 U.S. 38, 45, 83 S.Ct. 97, 102 (1962).

Indeed, if the rationale of the Court below is accepted, an illegal tie-in could never be shown. By definition, a tying product is desired by consumers because of its particular characteristics or the unavailability of acceptable substitutes. And the buyer always has the alternative of foregoing the opportunity afforded by the tying arrangement.

Accordingly, the "other explanations" referred to in *Northern Pacific* and *Fortner II* are clearly *economic* in nature: in *Northern Pacific*, "other explanations" did not exist because the total package was not shown to be "cheaper"; in *Fortner II*, "other explanations" did exist because of the possibility that "the price for the entire package was equal to, or below, a competitive price." In neither case, however, was the buyer's desire for land or credit *alone* deemed sufficient to justify or explain the tying arrangement.

III.

THE COURT BELOW FAILED PROPERLY TO ANALYZE OTHER FACTORS CONSIDERED IN FORTNER II WHICH SUPPORT A FINDING OF LIABILITY IN THIS CASE.

Based on the foregoing, it is submitted that the Court below erred in restricting the petitioners on remand to proof of uniqueness, excluding all other accepted methods of demonstrating economic power. Indeed, it is submitted that the petitioners so clearly established economic detriment imposed on such large numbers that they are now entitled to an affirmative judgment. *Aamco Auto-*

matic Transmissions, Inc. v. Tayloe, 407 F.Supp. 430 (E.D.Pa. 1976). Moreover, the Court below ignored other language in *Fortner II* which clearly supports a liability determination.

For example, this Court quoted with approval language to the effect that economic power would exist "[i]f the price [of the tying product] could have been raised but the tie-in was demanded in lieu of the higher price," 429 U.S., 620 fn. 13, 97 S.Ct., 868, and this Court stated that use of a tie-in to facilitate price discrimination might "imply the existence of power that a free market would not tolerate," 429 U.S., 617, 97 S.Ct., 866. Here, Spartan in its dealings with others not only could, but did effectively raise the price of the tying product (by retaining a portion of the amount it received from the hatchery for eggs) and the resulting discriminatory impact was substantial.

As indicated above, by receiving 69 cents per dozen for eggs and being required to "feed SPARTAN Feed," the producers suffered an economic detriment, before consideration of other set-offs, of $68,000 ($114,000 in feed overcharges less the $46,000 value of the egg market). If, however, the petitioners had been afforded the less restrictive opportunity afforded to a limited number of producers in the adjacent Gainesville market of receiving 67 cents per dozen for eggs and being able to purchase Spartan's less expensive, private label fee, the comparable economic detriment would have been only $43,000 ($65,000 in feed overcharges less $22,000 in reduced egg receipts). And, if the petitioners had received 65 cents per dozen for eggs without the imposition of a feed tie-in, as did an even more limited number of Gainsville producers with economic power admittedly equal to Spartan's, the petitioners would have suffered no economic detriment

whatsoever. The Spartan program thus worked like the computer card tie-in declared illegal in *International Business Machine Corp. v. United States*, 298 U.S. 131, 56 S.Ct. 701 (1936): those with a greater need for the tying device were charged substantially more for its use.

Similarly, the Court below failed to make any real distinction between the facts of this case and those of *Fortner II* based on the nature of the tying product under consideration. In *Fortner I*, for example, this Court noted that "money is a fungible commodity," 394 U.S., 509, 89 S.Ct., 1261, and, indeed, it is difficult in a free economy to conceive of a more fungible commodity, available from as many different types of institutions and pursuant to as wide a variety of terms. Inherently, therefore, money is even less subject to an exercise of economic power than is flour, this Court having noted with respect to the latter that:

> . . . if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself. [*Northern Pacific,* 356 U.S., 7, 78 S.Ct., 519.]

When, therefore, Fortner agreed to purchase 210 homes for $689,000 in order to obtain a $2,000,000 loan, he was in a position from the outset to determine whether the higher cost of U.S. Steel's homes was offset by the lower cost of its credit. Otherwise, he could have resorted to other lending institutions and purchased homes on the open market.

Here, by contrast, flocks with a prearranged egg market were available to petitioners only from Spartan and even if alternatives had existed, advance comparisons were foreclosed by Spartan's requirement that the petitioners,

for a period of up to 15 months, purchase an indeterminate amount of feed for an unspecified price. Feed quality alone would vary requirements by as much as 20% and, whereas Spartan's price initially was $15.00 per ton above the competitive level, the difference increased between 1969 and 1971 to $25.00 per ton. Accordingly, the cumulative variance on a single flock could exceed $18,000 -- 60% more than would have been paid to a competitor. It is submitted, therefore, that a condition that a buyer, for more than a year, acquire all his needs for a given product from a single seller at whatever price and quality that seller, in its sole discretion, elects to provide is inherently burdensome and can only result where economic power is present.

IV.

IN FAILING TO HOLD THAT RECIPROCITY IS A PER SE VIOLATION OF THE SHERMAN ACT, THE COURT BELOW IS IN CONFLICT WITH VIRTUALLY EVERY OTHER DECISION WHICH HAS CONSIDERED THE SUBJECT.

On appeal, the petitioners contended and the Court below agreed that the totality of Spartan's "package" could be logically analyzed in either of two ways: (i) as a tying arrangement pursuant to which Spartan made available to plaintiffs flocks as to which it had secured hatching egg commitments on the condition that the flocks be fed Spartan feed; or (ii) as a reciprocity agreement pursuant to which Spartan undertook to purchase the plaintiffs' eggs in return for the plaintiffs' commitment to feed Spartan feed. In the latter respect, coercive reciprocity has long been deemed to be a *per se* violation of the Sherman Act, *California Packing Corp.*, 25 F.T.C. 379 (1937); *Waugh Equipment Co.*, 15 F.T.C. 232 (1931),

and it is submitted that more than ample evidence of coercion existed in this case.

Of even greater significance, every court which has had occasion to consider the question has concluded that a reciprocity agreement, whether the result of coercion or mutual participation, is a *per se* violation of the antitrust laws. *F.T.C. v. Consolidated Foods Corp.*, 380 U.S. 592, 594, 85 S.Ct. 1220, 1221-22 (1965); *United States v. General Dynamics Corp.*, 258 F.Supp. 36, 65-66 (S.D. N.Y. 1966); *Allis-Chalmers Mfg. Co. v. White Consolidated Indus., Inc.*, 414 F.2d 506, 518-19 (3rd Cir. 1969); *United States v. Airco, Inc.*, 386 F.Supp. 915, 917 (S.D. N.Y. 1974); *Ryals v. National Car Rental System, Inc.*, 404 F.Supp. 481, 485 (D. Minn. 1975); *Stavrides v. Mellon National Bank & Trust Co.*, 353 F. Supp. 1072, 1077 fn.6 (W.D. Pa. 1973).[9] The economic reason for the distinction between tying agreements and reciprocity is quite simple. A tying arrangement can impact competition only if the seller has sufficient economic power over buyers so that other sellers are foreclosed from a market. With reciprocity, however, other sellers are automatically foreclosed even if neither party to the reciprocal agreement has power over the other. As stated, therefore, in *United States v. General Dynamics, supra*, 258 F.Supp., 66:

> For a "tying-in" arrangement to be consummated, there must be a strong demand for the tying product. If this is not the case, the would-be customer might well elect to purchase neither the tying nor tied product. In other words, without power in one market which can be transferred to interfere with a

[9]The volume of direct holdings would obviously be much greater were it not for the substantial number of consent decrees enjoining reciprocal practices.

purchaser's freedom of choice in a second market, tying is impossible. With mutual patronage reciprocity, on the other hand, purchasing power is used by both parties as a sales generating device, although no force is exerted from any quarter.

If anti-trust legislation was designed primarily to insulate customers from abuse, the "tying-in" analogy would be without merit with reference to non-coercive reciprocity. However, this is not the case. The legislation is intended to preserve free competition. Reciprocity, whether mutual or coercive, serves to exclude competitors by the exercise of large scale purchasing power. This court concludes that the analogy of reciprocity to "tying-in" arrangements applies to both forms of reciprocity.

This does not mean, of course, that one party to a reciprocity agreement who has paid a supra-competitive price is automatically entitled to recover from the other. As noted above, a defendant is entitled to have the "beneficial byproducts of a restriction . . . taken into consideration in computing damages," *Perma Life Mufflers*, 392 U.S., 140, 88 S.Ct., 1985, so that if the parties are of equal bargaining strength, the harm is likely to be offsetting and the plaintiff will be unable to establish "fact of damage."

Moreover, even if one of two truly equal parties has bargained poorly so that the harm is imbalanced, the participant in the deficit position will still be precluded from recovery by the still viable parameters of the *in pari delicto* defense. As stated, for example, in *Columbia Nitrogen Corporation v. Royster Company*, 451 F.2d 3, 15-16 (4th Cir. 1971):

> . . . when parties of substantially equal economic strength mutually participate in the formulation and execution of the scheme and bear equal responsibility for the consequent restraint of trade, each is barred from seeking treble damages from the other.

Here, the harm clearly was not offsetting. Indeed, unlike the defendant in *Fortner II* who assumed a substantial risk with respect to the credit it extended to the plaintiff, Spartan assumed no risk whatsoever in paying the petitioners 69 cents per dozen for eggs since that price was covered by a preexisitng commitment from a hatchery. And it was undisputed that Spartan was solely responsible for the formulation and execution of the breeder flock program. On this ground, alone, therefore, the petitioners should be relieved of the uniqueness standard imposed on them by the Court below. Irrespective of economic power, reciprocity restrains competition as automatically as does a division of markets or a boycott of a third party and reciprocity should thus bear a similar *per se* label.

CONCLUSION

Because the decision of the Fifth Circuit Court of Appeals places that Circuit in direct conflict with the position of other Circuits with respect to Tying and Reciprocity violations under the Antitrust laws, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE B. HALEY
KILPATRICK, CODY, ROGERS, McCLATCHEY & REGENSTEIN
3100 Equitable Building
100 Peachtree Street
Atlanta, Georgia 30303
(404) 572-6500
Counsel for Petitioners.

May 11, 1979

APPENDIX

APPENDIX

SPARTAN GRAIN & MILL COMPANY,
Plaintiff-Appellant,
Cross-Appellee,

v.

Virgil AYERS et al., Defendants-Appellees,
Cross-Appellants.

Joe ACKER, Plaintiff-Appellee,
Cross-Appellant,

v.

SPARTAN GRAIN & MILL COMPANY,
Defendant-Appellant,
Cross-Appellee.

No. 76-2845.

United States Court of Appeals,
Fifth Circuit.
Oct. 3, 1978.

Appeals from the United States District Court for the Middle District of Georgia.

Before WISDOM, TJOFLAT and VANCE, Circuit Judges.

WISDOM, Ciruit Judge:

Chicken feed transactions in North-eastern Georgia produced this important antitrust litigation involving integrated poultry operations. Spartan Grain & Milling Company [Spartan], a seller of chicken feed, sued

chicken producers (Virgil Ayers, W. C. Meaders, Jr., Boyce Blackmon, and Joe Acker) for the unpaid balances of their feed bills. The producers counterclaimed, maintaining that Spartan had violated several provisions of the antitrust acts. Joe Acker, the fourth producer, filed his own antitrust suit against Spartan. The district court directed a verdict for the producers on their antitrust claims. We reverse and remand.

I.

We must begin with an explanation on the broiler chicken industry.[1] The industry was born about fifty years ago. Fresh chicken had been a seasonal by-product of egg production. Less productive hens and young cockerels were culled from laying flocks in the late spring and early summer. These "June fryers" were tougher, dryer, and gamier than the broilers we eat today. In 1934 the average American ate eight ounces of chicken.

During the 1930's, enterprising egg producers realized that a market existed for chicken year-round. Broilers were raised independently of egg-laying flocks. Production of broilers quadrupled from 1934 to 1940, then doubled from 1940 to 1945. After World War II the expansion continued, largely as a result of capital investment by feed manufacturers and chicken processors. By

[1] This discussion of the structure and development of the industry is based largely on three opinions and one law review article. *See Bayside Enterprises, Inc. v. N.L.R.B.*, 1977, 429 U.S. 298, 97 S.Ct. 576, 50 L.Ed.2D 494; *National Broiler Marketing Ass'n v. United States*, 1978,__ U.S. __, 98 S.Ct. 2122, 56 L.Ed. 2d 728, *aff'g* 5 Cir. 1977, 550 F.2d 1380; and *Spartan Grain & Mill Co. v. Ayers*, 5 Cir. 1975, 517 F.2d 214. The article, Brown, *United States v. National Broiler Marketing Association: Will the Chicken Lickin' Stand?*, 56 N.C. L.Rev. 29, 37–46, is particularly helpful.

1954 Americans were eating an average of 13½ pounds of broiler chicken a year. Supermarket distribution provided one boost; later, fast-food operations provided another. By 1975 the Department of Agriculture reported per capita consumption of chicken in this country as 40.9 pounds. The World Almanac 143 (1978).

The bird in question is a young chicken, between seven and ten weeks old. Broilers, also known as fryers, may be male or female. The market distinguishes between broilers and other poultry. Production of broilers involves several distinct steps.

The process begins with the primary breeder. This step produces chickens which are used as breeders, not as broilers. The chicks are shipped to "producers", such as those in this case, typically when they are one day old. Most of the birds shipped to the producers are pullets, although a few cockerels are included. After a week, the producers debeak the chicks. Soon, vaccinations begin. The birds are vaccinated for several fowl diseases, and tested for others. by the time they are twenty-four weeks old, they are ready to being laying eggs. A good flock is productive for 38 to 40 weeks from the time they begin laying.

The third step takes the eggs to the hatchery. There, they become broiler chicks. These chicks then move to the fourth step. delivery to the growers. Each of the first four steps involves the feed merchants, providing grain for the flocks. In the fifth step the processor slaughters and dresses the broiler to prepare it for market. The customers from whom the broiler is prepared are often large supermarket chains or fast-food chains.

In the first years of the industry, each of the steps was taken by different people. Title to the product changed

hands with each stage of the production process. After World War II the industry increasingly moved toward intergrating the production process. The greater financial resources of the feed merchants and the processors enabled them to finance the expansion of the industry. The integrators expanded their control of the birds at each stage. Today, 99 percent of the broilers are raised either by "contract growers" or by the integrated firms themselves. Contract growers take the newly hatched broilers and raise them for a fixed price a dozen. Chicken feed and veterinary needs are provided by the integrated firm. Title to the birds rests with the integrated firm. And control over the production decisions rest with the integrated firm. Other stages in the process have also lost much of their independence.

The parties in this case were out of step with their industry. Spartan was a feed merchant, operating for the most part on a non-integrated basis. The producers owned hen houses and had been in the poultry business for up to twenty years. The producers had raised laying flocks both on a contract basis and on an independent basis. They preferred the independent contractor status: they made their own decisions, paid for the services they wanted and had opportunities for greater return. Flock placements for that arrangement had not been available in their area since 1962. They would take flocks on a contract basis. They could not buy and raise flocks completely on their own. The risk that the hatching eggs could not be marketed would be too great. So, under either the independent or the contract system, the producers would produce only when they had someone committed to buy their hatching eggs.

In 1967 and 1968 the bottom fell out of the broiler industry in northeastern Georgia. Several firms had

actively placed flocks on a contract basis in that area. Some terminated their operations entirely; others pulled out of the producers' area, Franklin, Hart, and Elbert Counties. There were no flocks available with guaranteed markets for their eggs on either an independent or a contract basis. Then, Spartan stepped into the scene.

Integration of the industry caused problems for Spartan. As other feed merchants increased their control over producers and growers, Spartan's markets were disappearing. Its solution to integration was to arrange its own contractual integration. Spartan negotiated with the broiler hatcheries in Pennsylvania and Ohio for commitments to take hatching eggs. It also arranged for primary breeders to produce flocks of laying chicks. Finally, it offered these flocks, with guaranteed markets for their eggs, to the producers in northeastern Georgia. Title to the laying chicks was to pass from the primary breeder to the producer. Spartan would then buy the eggs from the producers and sell them to the hatcheries. The producers received independent contractor status. They paid for their chicks' feed and veterinary attention; they decided whether they wanted more flocks and when. Spartan paid several cents a dozen above the long term market price for eggs, and nine cents a dozen above the spot market price in Georgia.[2]

There was only one catch. Spartan pursued this contractual integration to keep its feed market. It required producers in its program to purchase only its feed.

---

[2]There was a dispute as to the actual differential. The parties stipulated to a nine cent difference, but the producers' objections at trial seem to have been that the nine cent difference existed only on spot sales, and not on other long run contracts. The resolution of this dispute is not important in this appeal.

Its feed cost $15 to $20 more per ton than comparable feed.[3]

The producers could join Spartan or stop producing broiler eggs. They joined. Meaders signed for contracts covering the period from October 1968 to July 1972. Ayers signed four contracts covering the period from May 1969 to August 1971. Blackmon signed five agreements for the period from November 1968 to May 1972. Acker had been dealing with Spartan since 1965. During the time relevant to this suit, he signed three contracts covering the period from May 1969 to January 1972.

Spartan phased out this program in 1971 and 1972. In November 1972 it filed suit in federal court against Ayers, Blackmon, and Meaders for the unpaid balances of their feed accounts. Federal jurisdiction stemmed from diversity of citizenship. In December 1972 these producers answered and asserted antitrust counterclaims. In August 1973 the district court struck the antitrust contentions as defenses to the contract action, and severed the antitrust counterclaims for later trial. That month Acker filed suit against Spartan on antitrust grounds. His suit was consolidated with the counterclaims of the other producers.

The contract portion of the case, with the non-antitrust counterclaims, was tried in May 1974. The district court directed a verdict for Spartan on the accounts claim and on four counterclaims. The court let one counterclaim go to the jury, which found for the producers. On the

[3] Again, this difference was also the subject of controversy at trial. Spartan admitted that its price was higher, but pointed out that it performed services that some of the other feed companies did not perform. On the other hand, the producers urged that the difference was even greater, because Spartan's feed was inferior.

accounts, Meaders owed about $9,000, Blackmon about $22,000, and Ayers about $24,000.

All parties appealed. Spartan argued that the judge should have directed a verdict for it on the counterclaim that went to the jury; the producers argued that the trial judge erred in directing verdicts against them on their other counterclaims. The producers did not appeal the directed verdict on the accounts. This Court upheld the directed verdicts on two counterclaims, reversed the directed verdicts on two others, and found sufficient evidence to support the jury's verdict on the counterclaim the producers had won below. *Spartan Grain & Mill Co. v. Ayers,* 5 Cir. 1975, 517 F.2d 214. The remanded issues were settled without another trial.

The producers' antitrust claims were tried in August 1975. They asserted that Spartan's dealings illegally tied the sale of feed to the sale of chicks and cockerels and to the purchase of eggs. These actions, they argued, were tie-in arrangements which violated section one of the Sherman Act, 15 U.S.C. § 1, and section three of the Clayton Act, 15 U.S.C. § 14. They also urged that these were reciprocal dealings prohibited by section one of the Sherman Act.

By September 1974 both sides had filed motions for summary judgment. The judge did not rule on the motions. Four days before trial he refused to grant summary judgment on the ground that such treatment was not appropriate in antitrust cases.

At the close of the producers' evidence, Spartan moved for a directed verdict. The trial court denied Spartan's motion, and expressed its conclusion that the producers had demonstrated a per se violation of the law. The Court ruled that, whether viewed as reciprocal dealing or as a

traditional tie-in, the transaction was a tying arrangement that constituted a per se violation under *Northern Pacific Railway Co. v. United States,* 1957, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545. The trial court then refused to accept the evidence on liability Spartan had proffered. According to Spartan's counsel, that evidence dealt with the reasonableness of Spartan's program and the alternatives open to the producers. The rest of the trial therefore was solely on the question of damages. The judge announced to the jury that he had decided, as a matter of law, that a violation had occurred.

After a trial on the issue of damages the jury returned verdicts for the producers, before trebling, ranging from $7,000 to $15,000. Final judgment was entered nine months later, after the trial court considered attorneys fees, a Truth in Lending Act question, and the amount of interest due on the earlier contract judgment.

All parties appealed. Spartan urges that the district court's decision on the liability question was in error both procedurally and substantively and that the jury's verdict on damages was inadequately supported. The producers take exception to two of the trial court's evidentiary rulings concerning damages. They also appeal from the award of attorneys fees, the date of the court's award of interest on the contract judgment, and the court's ruling that the Truth in Lending Act claim was time-barred.

II.

The trial court's conclusion that a per se violation of the antitrust laws occurred is the central issue of this appeal. Although the parties had argued before trial about the proper characterization of their dealings, the district judge did not consider the distinction crucial.

Under either characterization, he felt that *Northern Pacific* required a decision for the producers on liability. We agree that the characterization is relatively unimportant; we disagree, however, with the lower court's conclusion on liability.

Tying arrangements have been defined as "agreement[s] by a party to sell one product only on the condition that the buyer also purchases a different (or tied) product . . . ." *Northern Pacific*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545. Tying arrangements have repeatedly been held to be per se violations of both section one of the Sherman Act and section three of the Clayton Act. *E. g., International Business Machines Corp. v. United States*, 1936, 298 U.S. 131, 56 S.Ct. 701, 80 L.Ed. 1085. *International Salt Co. v. United States*, 1947, 332 U.S. 392, 68 S.Ct. 12, 92, L.Ed. 20; *Northern Pacific Railway Co. v. United States*, 1958, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545; *United States v. Loew's Inc.*, 1962, 371 U.S. 38, 83 S.Ct. 97, 9 L.Ed. 2d 11; *Fortner Enterprises, Inc. v. United States Steel Corp.*, 1969, 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (*Fortner I*).

[1] Per se illegality, however, has never meant that all tying arrangements are in fact illegal. Instead,

> "[t]hey are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected."

Northern Pacific, 356 U.S. at 6, 78 S.Ct. at 518. Recent cases in the area have focused on whether "sufficient economic power with respect to the tying product" exists. *United States Steel Corp. v. Fortner Enterprises,*

Inc., 1977, 429 U.S. 610, 97 S.Ct. 861, 51 L.Ed.2d 80 (*Fortner II*). Although the early tying cases were brought by the government, suits by private purchasers have become well-established.

[2] In contrast to tying arrangements, reciprocal dealings have not been the subject of extensive case law development. A reciprocal dealing arrangement exists when two parties face each other as both buyer and seller. One party offers to buy the other party's goods, but only if the second pary buys other goods from the first party. For example, if one party is both a food wholesaler and a provider of goods used in processing foods, food processors may be faced by a reciprocal requirement. The first party might agree to buy the processors' products only if the processors buy the processing goods from it. *See Federal Trade Commission v. Consolidated Foods Corp.*, 1965, 380 U.S. 592, 85 S.Ct. 1220, 14 L.Ed.2d 95.

Although there was an earlier line of reciprocity cases in the Federal Trade Commission duirng the 1930's,[4] the *Consolidated Foods* case was the first recent case in this area. That was an action brought by the F.T.C. under section seven of the Clayton Act to set aside a merger. The Supreme Court held that reciprocity could violate the Clayton Act.

> "We hold at the outset that the 'reciprocity' made possible by such an acquisition of one of the congeries of anticompetitive practices at which the antitrust laws are aimed. The practice results in 'an irrelevant and alien factor,' 62 FTC____, intruding into the choice among competing products . . . ."

[4] *See California Packing Corp.*, 1937, 25 F.T.C. 379; *Mechanical Manufacturing Co.*, 1932, 16 F.T.C. 67; *Waugh Equipment Co.*, 1931, 15 F.T.C. 232.

Consolidated Foods, 380 U.S. at 594, 85 S.Ct. at 1221. The Court found that substantial evidence supported the Commission's finding that the merger violated the Clayton Act, but its conclusion does not have clear implications for non-merger cases. The Court did not state whether these arrangements are per se violations; nor did it consider them in the context of private suits.

The United States pressed for applications of a per se standard to any agreements, express or implied, to sell only on reciprocal terms. *See United States v. General Dynamics Corp.*, 1966 S.D.N.Y., 258 F. Supp. 36; L. Sullivan, Antitrust 492-95 (1977). In *General Dynamics* the government sued again to set aside a merger. The distirct court agreed, apparently finding reciporcal dealings per se violations of the antitrust laws. 258 F.Supp. at 59.

Our research has turned up one reciprocity suit brought as a private action by a party to the arrangement. *Columbia Nitrogen Corp. v. Royster Co.*, 4 Cir. 1971, 451 F.2d 3. Royster sued Columbia for breach of contract; Columbia responded in part with an antitrust counterclaim based on reciprocal dealings. The trial judge distinguished between coercive and non-coercive reciprocity, resurrecting a distinction made by the F.T.C. in the 1930's. See L. Sullivan, Antitrust 493 (1977). The trial judge allowed Columbia to introduce evidence that Royster had economic power as a buyer of nitrogen from Columbia. Royster denied having this power. This issue of coercive reciprocity was submitted to the jury on a per se basis: the jury had to find only coercion and substantial impact on interstate commerce. The jury found for the defendant. 451 F.2d at 13. On appeal Columbia maintained that it should have been able to go to the jury on the issue of

"non-coercive" reciprocity. The Court of Appeals assumed that non-coercive reciprocity could violate the Sherman Act, but held that, as a matter of law:

> "[W]hen parties of substantially equal economic strength mutually participate in the formulation and execution of the scheme and bear equal responsibility for the consequent restraint of trade, each is barred from seeking treble damages from the other."

451 F.2d 15-16 [footnote omitted]. It found that the Columbia-Royster relationship fitted that description and affirmed.

The transactions at issue in this case could be characterized either as tie-ins or as reciprocal dealing. The attorneys for each side have argued persuasively each position. On the one hand Spartan was buying eggs and selling feed. The parties agreed that the guaranteed market for eggs was crucial to the producers. On the other hand Spartan did arrange for the producers to buy flocks. In some cases Spartan itself sold the chickens to the producers; in others, the legal title was transferred from the primary breeders but all the arrangements, including credit arrangements, were made by Spartan. Spartan demanded that the producers take its feed in order to participate in a package that included Spartan as both buyer and seller.

[3, 4] Fortunately, we need not shape this arrangement to fit either label. The two labels refer to similar phenomena. In each case one side of a transaction has special power in the market place. It uses this power to force those with whom it deals to make concessions in another market. In tying arrangements, a seller with economic power forces the purchaser to purchase something else to obtain the desired item. In reciprocal dealings a buyer with economic power forces a seller to buy something

from it to sell its goods. In both cases the key is the extension of economic power in one market to another market. Thus, in cases brought by parties to the agreement, the standard for judging reciprocal agreements should be no higher than the standard for judging tie-in arrangements.[5] Therefore, in this case we review the district court's action under the per se standard appropriate for tying cases.[6] The proper standard for judging reciprocal arrangements is no higher.[7]

[5] As discussed, a tying arrangement is illegal per se whenever "a party has sufficient economic power with

---

[5] We intimate no view as to the proper standard in a suit brought by the government against reciprocal dealings. The government's concern in such cases is with the preclusion of other dealers from the market, not with the effects of the agreement on the parties to it. Different considerations may govern.

[6] It is also possible to base a tying suit on the general prohibitions of the Sherman Act, without relying on the per se rule. There, the plaintiff would have to embrace rule of reason evidence and arguments. *See Fortner* I, 394 U.S. at 500, 89 S.Ct. 1252, *Fortner* II, 429 U.S. at 612 n.1, 97 S.Ct. 861. The producers did not take this course.

[7] We find no reason to adopt the view expressed in *Columbia Nitrogen Corp. v. Royster Co.*, 4 Cir. 1971, 451 F.2d 3, concerning the damages available in a private reciprocity action. That decision assumed a violation of the Act was made out, then held that there were no damages. Our decision rests on the earlier question, whether there was a violation.

In *Continental T.V., Inc., v. GTE Sylvania, Inc.*, 1977, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568, the Supreme Court overruled *United States v. Arnold, Schwinn & Co.*, 1967, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249, which had imposed a per se standard of illegality on vertically imposed territorial divisions. That decision cautions us against imposing strict standards of antitrust liability in fields where the economic consequences of the arrangements are not clear. Given the limited development of the law dealing with reciprocity, this is not a case for application of a standard *stricter* than the per se standard applied to tying arrangements.

respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected." *Northern Pacific*, 356 U.S. at 6, 78 S.Ct. at 518. There is no doubt here that a substantial amount of interstate commerce is involved; the dispute centers on whether Spartan had sufficient economic power in the relevant market. In determining this, we have the benefit of a Supreme Court decision not before the district judge: *United States Steel Corp. v. Fortner Enterprises, Inc.*, 1977, 429 U.S. 610, 97 S.Ct. 861, 51 L.Ed.2d 80 (*Fortner II*). We discuss it at some length because we regard it as controlling the case before us.

Fortner involved the sale of prefabricated homes by United States Steel to Fortner Enterprises. A subsidiary of U.S. Steel offered 100 per cent financing to Fortner for the purchase. The financing was at a particularly low rate and on terms favorable to Fortner. The financing was available, however, only on sales of homes from U.S. Steel to Fortner. The homes themselves were more expensive than those of U.S. Steel's competitors. The relationship between Fortner and the steel company soured; Fortner brought an antitrust action, contending that the credit had beed tied to the purchase of U.S. Steel's homes, in violation of section one of the Sherman Act. A summary judgment for U.S. Steel was reversed by the Supreme Court. *Fortner Enterprises, Inc. v. United States Steel*, 1969, 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (*Fortner I*). After a trial on remand, the district court directed a verdict for Fortner on the issue of liability. The Court of Appeals reversed and remanded. 6 Cir. 1971, 452 F.2d 1095, *cert. den.* 1972, 406 U.S. 919, 92 S.Ct. 1773, 32 L.Ed.2d 119. On remand the district court took additional evidence and again found

that U.S. Steel was liable.[8] The Court of Appeals affirmed, 6 Cir. 1975, 523 F.2d 961. The Supreme Court reversed in a unanimous opinion.

The only issue was whether Fortner had shown that U.S. Steel had economic power in the market for the tying product, credit. Four factors were advanced by Fortner to justify the lower courts' conclusion in its favor: the financial strength of U.S. Steel, the large number of similar arrangements made by U.S. Steel, the higher than market price paid for the houses, and the unique terms of the financing. 429 U.S. at 614, 97 S.Ct. 861.

The Court found the size of U.S. Steel irrelevant. It stressed that the size alone had not been shown to give the credit division any advantage in the cost of its funds or in its efficiency. The Court stressed that no cost advantage to U.S. Steel had been shown; therefore, nothing had been demonstrated about economic power. 429 U.S. at 617, 97 S.Ct. 861. The Court also found that the number of tying arrangements U.S. Steel entered did not show economic power. That factor is important only in "the absence of other explanations for the willingness of buyers to purchase the package". 429 U.S. at 618 n.10, 97 S.Ct. at 867. The non-competitive price paid by Fortner for homes was explained by the value of the entire package. "Proof that Fortner paid a higher price for the tied product is consistent with the possibility that the financing was unusually inexpensive and that the price for the entire package was equal to, or below, a

---

[8]The second trial after remand was made to the bench, because the parties waived trial by jury. The district court's conclusion came not on a directed verdict or summary judgment, but after this bench trial.

competitive price." 429 U.S. at 618, 97 S.Ct. at 866 [footnote omitted].

Thus, the Supreme Court found that the questions came down to one of uniqueness:

> "The most sifnificant finding made by the District Court related to the unique character of the credit extended to Fortner. This finding is particularly important because the unique character of the tying product has provided critical support for the finding of illegality in prior cases. Thus, the statutory grant of a patent monopoly in *International Salt v. United States*, 332 U.S. 392, 68 S.Ct. 12, 92, L.Ed. 20, [75 U.S.P.Q. 184]; the copyright monopolies in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260, and *United States v. Loew's Inc.*, 371 U.S. 38, 83 S.Ct. 97, 9 L.Ed.2d 11; and the extensive land holdings in *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545, represented tying products that the Court regarded as sufficiently unique to give rise to a presumption of economic power."

429 U.S. 619 S.Ct. 867 [footnotes omitted]. The Court put the uniqueness question in a nutshell: "In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product". 429 U.S. at 620, 97 S.Ct. at 868. *See also Fortner I*, 394 U.S. at p. 505 & n.2, 89 S.Ct. 1252. The fact that the financing arrangement was unique "without like or equal", did not mean that the seller possessed economic power.

> "Quite clearly, if the evidence merely shows that credit terms are unique because the seller is willing to accept a lesser profit—or to incur greater risks—than its competitors, that kind of uniqueness will not give rise to any inference of economic power in the credit market . . .

> Without any evidence that the Credit Corp. had some cost advantage over its competitors—*or could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected*—the unique character of its financing does not support the conclusion that petitioners had the kind of economic power which Fortner had the burden of proving in order to prevail in this litigation."

429 U.S. at 621-22, 97 S.Ct. at 868.

Fortner II requires that this case be reversed. The trial judge's discussion of the case shows that he was concerned because "nobody else had that arrangement at this particular time . . . ." The arrangement, which included providing birds and buying eggs, was being " 'use[d] as a lever' " according to the trial judge, quoting a Spartan internal memorandum. Citing *Northern Pacific*, he stated that "[t]he very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power, at least, where [as] here no other explanation has been offered for . . . these restraints". The trial court concentrated on the producers' position, and concluded that they had no reason to enter a requirements contract with Spartan for their feed except their need for egg markets and flocks. The court found that Spartan's ability to deal with hatcheries in other states, an ability that the producers lacked, produced its economic power.

The court relied on two of the factors urged by Fortner, the existence of tying arrangements and the uniqueness of the package. In *Fortner II* the Supreme Court rejected the first argument because there were other explanations for the willingness of the buyers "to purchase *the package*". The trial court here pointed

out that there were no other explanations for the willingness of the producers to agree to buy all their feed from Spartan, but the evidence makes clear their reason they "purchased[d] the package"—their alternative was to stop raising breeding flocks of broilers. Thus, this argument really stands with the uniqueness argument. Yet, Spartan's program was "without like or equal" in that area of Georgia, it was not shown to be unique in the sense required in *Fortner II*. There was no evidence as to *why* Spartan was the only firm offering this package. There was no evidence that Spartan had any cost advantage over its rivals. In fact, the eventual termination of the program might support an inference that Spartan had no advantages over its rivals; instead, it may have made a mistake they avoided. Nothing presented in the district court showed that Spartan's program was "significantly differentiated from that which other [companies] could offer it they so elected . . . ." In light of *Fortner II*, therefore, the requirements for finding a per se violation of the antitrust laws were not shown.

In their supplemental brief the producers argue that *Fortner II* does not damage their position. They urge that credit, the product involved in *Fortner II*, is not chickens. Credit is fungible and widely available. The producers point out again that flock placements, with guaranteed egg markets, were scarce. This argument is merely the uniqueness point in a different guise. The producers must show that Spartan had some economic advantage which enabled it to offer this arrangement when its rivals could not. The producers contend that price comparisons, easily made by Fortner, were impossible for them because the price of the feed they contracted for varied. While that may have made comparisons difficult, the producers have not shown that comparisons

were impossible. All producers and consumers, and particularly farmers, operate in markets where prices may vary. The producers have already been defeated in their contention that the prices charged by Spartan were unreasonable in contravention of the Uniform Commercial Code, §2-305(1), Ga. Code §109A-2-305(1). *Spartan Grain & Mill Co. v. Ayers*, 5 Cir. 1975, 517 F.2d 214, 217. The producers urge that Spartan was much more sophisticated and powerful than they. The economic power *Fortner II* requires, however, must come from Spartan's relationship with its competition. If it had effective competitors in this field, economic power would not have been shown, even though *all* the companies be more sophisticated and powerful than the producers.

The producers make one other attempt to avoid the force of *Fortner II*. They urge that under section three of the Clayton Act, economic power is not required for a per se violation. The Clayton Act, passed as a response to what Congress considered grudging constructions of the Sherman Act by the courts, specifically bans tying arrangements.

> "It shall be unlawful for any perosn engaged in commerce, to . . . make a sale or contract for sale of goods, . . supplies, or other commodities . . for use, comsumption, or resale within the United States . . . on the condition, agreement or understanding that . . . [the] purchaser thereof shall not use or deal in the goods, . . supplies, or other commodities of a competitor or competitors of the . . . seller, where the effect of such . . sale . . . may be to substantially lessen competition . . . in any line of commerce."

15 U.S.C. §14

First, this section should not be applied to this case. Although we have recognized that the situation here par-

takes of elements of both tying arrangements and reciprocal arrangements, the true tying product was the purchase of the eggs. The producers did not contend that they could not buy flocks without egg commitments, merely that neither they nor any other producer would do such a foolish thing. The egg commitments were crucial, and such commitments are not "a sale or contract for sale of goods". Though we believe that the law of this case can best be found from the tying precedents, it does not fall within the explicit language of the Clayton Act.

Second, the producers overstate the distinction between the Clayton and Sherman Acts in this field. Although this Court has stated, in dictum, that section three of the Clayton Act does not require a showing of economic power, *Sulmeyer v. Coca Cola Co.*, 5 Cir. 1975, 515 F.2d 835, it drew that conclusion from a case from the Fourth Circuit. *Advance Business Systems & Supply Co. v. SCM Corp.*, 4 Cir. 1969, 415 F.2d 55, cert. den. 1970, 397 U.S. 920, 90 S.Ct. 928, 25 L.Ed.2d 101. In *Advance Business Systems*, however, the Fourth Circuit relied on a presumption of economic power it drew from the existence of the tying arrangements. It based that presumption on two Supreme Court cases, *Northern Pacific* and *Fortner I*. In light of *Fortner II*, that presumption is no longer strong enough to warrant the conclusion that no separate showing of economic power is necessary in the Clayton Act.[9]

---

[9] In *Advance Business Systems*, the Court of Appeals for the Fourth Circuit said:

> "Congress singled out tie-ins for special treatment in the Clayton Act upon the generally accepted view that they rarely have any function other than suppression of competition. For the same reason, a seller's successful imposition of a tying arrangement on a substantial amount of commerce

[footnote continued]

[6] The producers on this record can prevail neither under the Sherman Act nor under the Clayton Act. The question remaining is whether judgment should be entered for the defendant, as was the case in *Fortner II*, or the case be remanded for a new trial. The parties built this record on a faulty conception of the requirements for proving a per se violation. Their misconception was shared by the district court, and was reasonable in light of the earlier Supreme Court decisions in the field. No evidence was introduced to show that Spartan did *not* have the kind of cost advantage that the Supreme Court considered important in *Fortner II*. We think, therefore, that the case should be remanded for a new determination of the crucial factual question: did Spartan have economic power in this market?

III.

Our resolution of the substantive antitrust issues in this case disposes of several other appealed questions.[10] Four issues remain.

> may be taken as proof of his economic power over the tying product. See *Fortner Enterprises* [I] . . . *Northern Pacific* . . . . [citations omitted]. The Clayton Act *therefore* requires no separate showing of economic dominance where a tying arrangement affects sufficient commerce." [Empahsis added.]

415 F.2d at 62. At least one commentator has attacked use of a weaker standard under the Clayton Act. *See* L. Sullivan, Antitrust 440-41 (1977).

[10] The question whether the district court erred procedurally by granting a directed verdict at the close of *plaintiffs'* evidence is now moot. So is the question whether the district court abused its discretion in the award of attorneys' fees. The prevailing party in this litigation is once again in question. The evidentiary issue concerning Spartan's practices in other areas should be reconsidered by the trial court in light of the larger inquiry into Spartan's market position required on remand.

Two final issues Spartan raises must be rejected. (a) The district court did not err by failing to find, as a matter of law, that the pro-

[footnote continued]

[7] First, the producers contend that the judge erred in refusing to permit them to introduce evidence dealing with the quality of Spartan's feed. They maintain that Spartan's feed became less nutritious at one point. Thus, their damages from being required to buy Spartan feed should have included not only the price difference, but a sum for the lower quality of the chicken feed. The trial court refused to allow expert testimony on the quality, apparently in response to Spartan's argument that this issue had been resolved in the trial of the contract claims. Rec., Vol. VII, 142-52. The trial court in the first case did direct a verdict against the producers on the feed question. The producers did not appeal. Although the question is now one of antitrust damages, the issue is the same. The producers cannot raise it again.

[8] Second, the producers charge the trial court erred by allowing Spartan interest on the contract judgment from the date of entry of the district court judgment. The producers appealed the district court's directed verdicts against their counterclaims to this Court, won reversal on several of their claims, and then settled those issues with Spartan. The producers advance two reasons why interest should run from a later date: the reversals meant that no final judgment had been entered below, and the long delay, against the producers' wishes, in

---

ducers had no damages. We view this question as dependent, of course, on the liability question. If liability had been properly established, damages could have been recovered. The amount of those damages was properly submitted to the jury. (b) Nor did the district court err in rejecting Spartan's res judicata argument. Spartan urges that because, in the contract action, the lower court and this Court agreed that the price of its feed was not unreasonable under U.C.C. standards, it could not have been a violation of the antitrust laws. Spartan has cited no authority for the proposition that commercially reasonable prices cannot still be higher than those which could have been obtained absent an antitrust violation. The argument is meritless.

trying the antitrust case made in unfair to charge them with interest from before the conclusion of that case. The producers won reversals in the contracts case on several counterclaims; they never appealed the directed verdict granted Spartan on its accounts. As to that money, the judgment of the district court was not just affirmed, which under Rule 37 of the Federal Rules of Appellate Procedure would make interest run from the date of the district court judgment. The judgment was never questioned. The separate issues of the counterclaims should not disturb that unappealed ruling. Fairness does not require a different result. The contract claims were on the producers' accounts with Spartan. They complain that the interest run up over the past years amounts to a formidable sum. So does the sum representing the returns Spartan might have made had the producers paid their accounts when due. The producers have had the use of these funds since the district court's first judgment; it is not unfair that interest should run against them from that time.

Third, the producers appeal from the district court's ruling that their Truth-in-Lending Act claim was time-barred. Their counterclaim involved interest rate disclosures. The last purchase of feed any producer made from Spartan was in July 1972. The counterclaim was asserted in March 1974. The Truth-in-Lending Act has a one year statute of limitation. 15 U.S.C. §1640(e). The producers also maintain, however, that their counterclaim be treated in the alternative as an equitable recoupment, whichh admittedly is not subject to a statute of limitations.

[9] We think that the district court properly found the Truth-in-Lending counterclaim time-barred. Whether or not it properly applied *Goldman v. First National*

Bank, 1975, N.D.Ill., 392 F.Supp. 214, in finding that the statute ran from the time the purchase contracts were made, the claims would still be barred. Spartan's complaint was filed within one year of the last purchases. The producers assert that the complaint tolled the statute of limitations on all compulsory counterclaims, citing *De Vito v. Hoffman*, 1952, 91 U.S.App.D.C. 263, 199 F.2d 468. That proposition has not been entirely accepted. *See* Wright & Miller, Federal Practice and Procedure, § §1409, 1419. The producers assumed too easily, however, that a Truth-in-Lending counterclaim to a suit on an account is a compulsory counterclaim. While we have found no precedent directly on point, two district courts have decided the converse question: That actions for money owed are permissive counterclaims to Truth-in-Lending Act suits. *Zeltzer v. Carte Blanche Corp.*, 1976, W.D.Pa., 414 F.Supp. 1221, *Roberts v. National School of Radio & Television Broadcasting*, 1974, N.D.Ga., 374 F.Supp. 1266, 1270-71. In that situation a conclusion that the counterclaim was compulsory would have required a federal court to take jurisdiction over state law matters; here, the counterclaim involves the federal statute. Although that distinction would make compulsory status more likely, we feel this counterclaim is still better considered permissive. Although it arises from the contract transaction, the Truth-in-Lending Act claim involves entirely separate questions of law and fact from those dealing with the producers' liability on their accounts. Therefore, the statute of limitations was not tolled by the filing of the complaint even if the filing would toll the statute for a compulsory counterclaim. Thus, whether the statute began to run when the contract was made, as the district court held, or when the transactions were consummated, this counterclaim was time-barred.

The producers' recoupment claim remains. As they point out, recoupment has been recognized as an equitable defense, not controlled by statutes of limitations. The record does not show why the district court rejected the producers' request for recoupment. The judge did hold that the producers' usury claims had been abandoned. Whether this included the recoupment claim or not is unclear. The record dealing with the interest question is limited: we have not been able to discover whether recoupment was raised below. The producers' recoupment argument appears at least substantial. On remand, if the district court concludes that the issue was presented to it originally, it should deal with the issue. If the issue was abandoned, of course, the district court need not give the producers another chance.

IV.

Integration of the broiler chicken industry continues to provide difficult questions for appellate courts. *See National Broiler Marketing Ass'n v. United States*, 1978, —— U.S. ——, 98 S.Ct. 2122, 56 L.Ed.2d 728 (Capper-Volstead antitrust exemption for farmers' cooperatives does not apply to N.B.M.A.); *Bayside Enterprises, Inc. v. N.L.R.B.*, 1977, 429 U.S. 298, 97 S.Ct. 576, 50 L.Ed.2d 494 (truck drivers transporting feed for a vertically integrated poultry firm are not agricultural laborers, exempt from the N.L.R.A.). Spartan's efforts toward contractual vertical integration present questions in the area between tying arrangements and reciprocal dealings, in a time when antitrust law in that field is undergoing a change in emphasis. As a result, we must reverse and remand for a new trial. The judgment of the district court is AFFIRMED IN PART and REVERSED AND REMANDED IN PART.

Supreme Court, U. S.
FILED
JUN 8 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1699

VIRGIL AYERS, W.C. MEADERS, JR.,
VOYCE BLACKMON and JOE ACKER,

Petitioners,

v.

SPARTAN GRAIN & MILL COMPANY,

Respondent.

BRIEF IN OPPOSITION

JOHN C. BUTTERS
2403 Nat'l. Bank of
Georgia Building
Atlanta, Georgia 30303

J. VINCENT COOK
COOK, NOELL, BATES
& WARNES
P.O. Box 1927
Athens, Georgia 30601

May 23, 1979

Washington, D.C. • THIEL PRESS • (202) 638-4821

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 1

QUESTION PRESENTED 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT:

I. The opinion below exactly follows the rationale of the Supreme Court in Fortner II and is fully supported by that opinion 4

II. There is no conflict between Circuits 5

CONCLUSION 6

TABLE OF AUTHORITIES

Cases:

Moore v. Jas. H. Matthews & Co., 550 F.2d 1207 (9th Cir. 1977) 5

Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958) 3

United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977) (Fortner II) 2, 3

Spartan Grain & Mill Co. v. Ayers, et al., 591 F.2d 419 (9th Cir. 1978) 1

Statutes:

Sherman Antitrust Act of 1890, Section 1, 15 U.S.C. §1 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1699

VIRGIL AYERS, W.C. MEADERS, JR.,
VOYCE BLACKMON and JOE ACKER,

Petitioners,

v.

SPARTAN GRAIN & MILL COMPANY,

Respondent.

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is *Spartan Grain & Mill Co., v. Ayers et. al.*, 581 F.2d 419 (5th Cir. 1978) and is reprinted as the Appendix to the Peitition for Writ of Certiorari.

JURISDICTION

The Petition accurately states the jurisdiction of the Court.

QUESTION PRESENTED

Does *Fortner II*[1] demand that Spartan's program was not a per se illegal tie-in where there was no showing that Spartan had a competitive advantage in the market for the tying product?

STATEMENT OF THE CASE

Judge Wisdom's decision below, articulately sets out the background history of the poultry industry, and accurately states the factual setting of this case. Rather than recite such detailed information in this brief, Spartan directs the Court's attention to the Fifth Circuit opinion in the event the Court desires detailed factual material. Here, Spartan will highlight only certain key facts.

As was mentioned by the lower court decision, there are several distinct steps in the production of broiler chickens. Following World War II, the companies in the industry moved toward the consolidation of these steps of production under one roof. As a result of this integration of the industry, independent segments of the industry which did not consolidate, like Spartan, a feed company, had no markets for their product. Similarly, the independent farmer lost a market in which to sell his hatching eggs.

In the late 1960's Spartan established a program which would give Spartan a market for its feed and at the same time provide the farmer a market for his hatching eggs. Spartan negotiated with broiler hatcheries in Pennsylvania and Ohio for commitments to buy hatching eggs,

[1] *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 97 S.Ct. 861, 51 L.Ed.2d 80 (1977) (Fortner II).

and also arranged with primary breeders to produce flocks of laying chicks. This enabled Spartan to offer a program to the farmer, producer, whereby Spartan would purchase the eggs from the producer's flock and the producer would feed Spartan feed to his birds.

The producers entered numerous contracts with Spartan on a yearly basis from the late 1960's until 1971 and 1972 when Spartan phased out its program. In November, 1972 Spartan filed suit in federal court against producers Ayers, Blackman, and Meadors for unpaid balances of their feed accounts and the producers filed an antitrust counterclaim. Together with Mr. Acker, who filed his antitrust suit in August, 1973, the producers challenged Spartan's program as a per se illegal tying arrangement and a per se illegal reciprocal dealing arrangement in violation of section 1 of the Sherman Act, 15 U.S.C. §1.

Ultimately, the trial court directed a verdict against Spartan at the close of the producers' evidence, holding that the program was a per se violation of section 1 of the Sherman Act. The trial court reasoned that whether viewed as reciprocal dealing or as a tie-in, the program was a per se illegal tying arrangement under *Northern Pacific Railway Co. v. United States,* 356 U.S. L, 78 S. Ct. 514, 2L.Ed.2d 545 (1957). On appeal to the United States Court of Appeals for the Fifth Circuit, Judge Wisdom, reversed and remanded under *United States Steel Corp. v. Fortner Enterprises, Inc.,* 429 U.S. 610, 97 S.Ct.861, 51 L.Ed2d 80 (1977) (Fortner II), stating that the program was not per se illegal. On remand the producers must prove that Spartan had the economic power in the market of the tying product (purchase of eggs) in the form of a cost advantage over its competitors. This was the very test articulated by the Supreme Court in *Fortner II.*

REASONS FOR DENYING THE WRIT

I.

THE OPINION BELOW EXACTLY FOLLOWS THE RATIONALE OF THE SUPREME COURT IN FORTNER II AND IS FULLY SUPPORTED BY THAT OPINION.

In discussing the *Fortner II* decision, the court below stated in pertinent part as follows:

> The only issue was whether Fortner had shown that U.S. Steel had economic power in the market for the tying product, credit . . .
>
> The Court found the size of U.S. Steel irrelevant. . . The Court also found that the number of tying arrangements U.S. Steel entered did not show the economic power. . . The Court put the uniqueness question in a nutshell: "In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product". . .
>
> "Quite clearly, if the evidence merely shows that credit terms are unique because the seller is willing to accept a lesser profit—or to incur greater risks—than its competitors, that kind of uniqueness will not give rise to any inference of economic power in the credit market. . .
>
> Without any evidence that the Credit Corp had some cost advantage over its competitors—or could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected—the unique character of its financing does not support the conclusion that petitioners had the kind of economic power which Fortner had the burden of proving in order to prevail in this litigation." 429 U.S. at 621-22, 97 S.Ct. at 868.

In applying the *Fortner II* standard to the case at bar, Judge Widsom stated:

> Yet, although Spartan's program was "without like or equal" in that area of Georgia, it was not shown to be unique in the sense required in Fortner II. There was no evidence as to why Spartan was the only firm offering this package. There was no evidence that Spartan had any cost advantage over its rivals. In fact, the eventual termination of the program might support in inference that Spartan had no advantages over its rivals; instead, it may have made a mistake they avoided. Nothing presented in the district court showed that Spartan's program was significantly differentiated from that which other (companies) could offer if they so elected . . . In light of Fortner II, therefore, the requirements for finding a per se violation of the antitrust laws were not shown.

Accordingly, the Fifth Circuit correctly applied *Fortner II,* and it is unnecessary for the Supreme Court to grant the petition for a writ of certiorari in the present case.

II.

THERE IS NO CONFLICT BETWEEN CIRCUITS

In their petition for writ of certiorari the producers suggest that Judge Wisdom's decision in the court below is in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Moore v. Jas. H. Matthews & Co.,* 550 F.2d 1207 (9th Cir. 1977). The petitioner however, fails to discuss any such conflict; and, indeed, no conflict appears upon reading the two decisions.

CONCLUSION

Judge Wisdom correctly applied the guidelines of Fortner II in disposing of the producer's antitrust claims, and the decision is not in conflict with other circuits. Accordingly, Spartan respectfully urges that the petition for a writ of certiorari be denied.

Respectfully submitted,

JOHN C. BUTTERS
2403 National Bank
of Georgia Building
34 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 688-0440
Counsel for Respondent.